MOTION FILED

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No. 04-1107

IN THE

Supreme Court of the United States

IN RE: FOCUS MEDIA, INC.,
Debtor,

FOCUS MEDIA, INC.,
Petitioner,

vs.

NATIONAL BROADCASTING COMPANY, INC.;
ABC, INC.; PAXSON COMMUNICATIONS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE LATINO COALITION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

THE AMICI CURIAE

The Latino Coalition is a non-profit, non-partisan national organization based in Washington, D.C., whose mission is to research and develop policies that are relevant to Latino-Americans' overall economic, cultural, and social development. As part of this mission, The Latino Coalition monitors public policy, including that formulated by the judiciary, at the federal, state, and local levels and analyzes and reports to the public about the impact of Federal, State, and local legislation on Latino communities.

MOTION OF THE LATINO COALITION TO FILE AMICUS CURIAE BRIEF

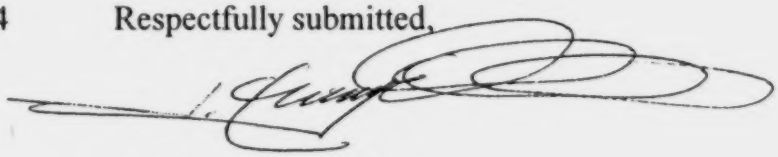
Pursuant to this Court's Rule 37.3(b), The Latino Coalition ("TLC") respectfully moves this Court for leave to file the attached Brief of Amicus Curiae in support of the Petitioner. A letter of consent from the Petitioner's counsel to the filing of this brief has been filed with the Clerk. However, Respondents' counsel has declined to give consent.

TLC's specific interest in this case lies in its unique impact on Latino Americans. Latino Americans are particularly beset by financial challenges and difficulties with creditors and, thus are uniquely affected by any change in the law that makes it easier for creditors to force them into bankruptcy against their wishes.

The Ninth Circuit Court of Appeals' decision held that an involuntary bankruptcy petition may be predicated on claims that are disputed in amount, contrary to the protections in Bankruptcy Code section 303(b). The implications for Latino Americans are dramatic. Disputes with creditors are more likely by virtue of both the socio-economic status of Latino Americans and the concomitant linguistic and cultural barriers in the legal system.

The loss of these protections in the Code makes it more difficult for Latino Americans to comprehend the claims asserted against them by creditors. Likewise, Latino Americans would be hindered, if not prevented, from articulating a clear response to those disputed claims that would otherwise foster an out-of-court resolution.

March 18, 2004 Respectfully submitted,



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QUESTION PRESENTED

1. May a petition for involuntary bankruptcy be based upon a claim, the amount of which is subject to a bona fide dispute?

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INTEREST OF THE *AMICUS CURIAE*

The Ninth Circuit's Opinion holds that an involuntary bankruptcy petition may be predicated on a claim that is subject to a *bona fide* dispute over its amount. This holding is both contrary to the specific language of section 303 of the United States Bankruptcy Code and contrary to the intent of Congress. The lower court's ruling has negative ramifications for Latino Americans. Financial and economic challenges that uniquely impact the Latino American community mean that its members are much more likely to become embroiled in disputes with creditors. This disputes could lead to significantly increased involuntary bankruptcy filings for this segment of the community. Moreover, disputes over amounts are more common for Latino Americans due to existing linguistic and cultural barriers in the legal system that already impede understanding and clear communication.

As discussed in this Amicus Brief, the Ninth Circuit's view is at variance with the Second Circuit Court of Appeals, which has held that a petition for involuntary bankruptcy may not be premised on a claim that is subject to a dispute over its amount. The Second Circuit holding is consistent with Bankruptcy Code section 303 and provides the protections that the Congress intended for alleged debtors, protections that were denied by the Ninth Circuit's Opinion below.

INTRODUCTION[1]

The Ninth Circuit Court of Appeals' Opinion held that an involuntary bankruptcy petition may be based upon a claim that is disputed over its amount, provided only that it appears from the allegations that the statutory threshold for filing an involuntary petition is satisfied. This holding conflicts with Bankruptcy Code section 303, which specifically disqualifies any claim that is the subject of a "*bona fide* dispute" from serving as the basis for an involuntary petition. The legislative history makes clear that Congress intended that an involuntary bankruptcy petition cannot be premised on a claim that is disputed in either liability *or amount.*

Yet the Ninth Circuit ignored the plain language of the statute and its legislative history. It held essentially that the claim on which an involuntary petition effectively can be split into two parts: the disputed and the apparently undisputed and the petition can then proceed without regard to the existence of the dispute. Not only is this holding contrary to law, but it is also bad public policy. Disputed claims should be resolved in civil court, not bankruptcy court. Bankruptcy carries a powerful stigma that the citizens of this Country should not be subjected absent appropriate safeguards. Congress provided the safeguard of closing the bankruptcy courthouse doors to creditors with disputed claims. The Ninth Circuit wants to put the keys to those doors in creditors' hands.

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[1] At the request of The Latino Coalition, counsel for Petitioner assisted in the preparation of this brief.

The Latino Coalition represents a constituency that is uniquely affected by the Ninth Circuit's ruling and respectfully requests that this Court grant certiorari to correct the injustice that occurred below.

ARGUMENT

Under section 303 of the United States Bankruptcy Code, an involuntary bankruptcy petition may not be brought if the claim on which it is based is in *bona fide* dispute. The following quotation from Senator Baucus, the author of the amendment that added the *bona fide* dispute requirement contemplates that a dispute over *either liability or amount* will bar the claim from serving as the basis for an involuntary bankruptcy:

> Under my amendment the original filing of an involuntary bankruptcy petition could not be based on debts that are the subject of a good faith dispute between the debtor and his or her creditors. In the same vein, the granting of an order of relief could not be premised solely on the failure of a debtor to pay debts that were legitimately contested as to liability *or amount*.

130 Congressional Record S7618, June 19, 1984, remarks of Senator Baucus. (Emphasis added.)

The disqualification of disputed claims from involuntary bankruptcy petitions anticipates the potential abuse of the process. Involuntary bankruptcy is a powerful tool in the hands of a creditor, and carries a strong stigma. It interferes with the alleged debtor's credit and ability to transact business in the usual course, even before an order for relief is entered. As such, the potential exists for an

unscrupulous creditor to use the threat of an involuntary bankruptcy to force a debtor to compromise a legitimately disputed debt. To avoid that abuse of the involuntary bankruptcy process, a dispute over either liability or amount should be held to disqualify an involuntary bankruptcy petition. If only a dispute over liability alone qualifies as a *bona fide* dispute, the potential for abuse still exists.

For example, a creditor owed a relatively modest sum could claim that it is owed many times that amount, under threat that if the creditor is not paid, an involuntary bankruptcy petition will be filed. Likewise, a creditor could force payment of a disputed amount by claiming that if the actual amount of the debt is not paid, the creditor will file an involuntary petition seeking several times what is even arguably owed.

Here, the Ninth Circuit Court of Appeals held that a dispute over amount would have to reduce the claim to something below the statutory threshold before the claim would be disqualified. It said that a dispute as to the amount of a claim "is relevant only if it takes the total debt below $10,775." The effect of this holding is that now, contrary to the statutory mandate, a claim effectively can be "split" into two parts: one disputed and one undisputed. If the bankruptcy court finds that the undisputed portion is above the statutory minimum, that part of the claim can support the involuntary petition, regardless of the dispute over the remainder.

Such a result is at odds with Bankruptcy Code section 303, which provides that an involuntary bankruptcy petition must be dismissed if the claim on which it is premised is *disputed*. The statute does not contemplate that a "claim" may be broken apart and separately analyzed to determine

whether the bankruptcy petition is properly brought. Rather, if a dispute exists over the "claim," the petitioners are disqualified.

Nonetheless, a claimant in bankruptcy barred from proceeding because the claim is disputed is not without a remedy. Civil litigation is still available as a means to resolve the dispute and reduce the debt to judgment. Further, requiring such claims to be decided in a normal civil action affords the would-be debtor the protections that the civil justice system guarantees.

The bankruptcy court should not have jurisdiction to decide the outcome of a disputed claim. Such claims have no place in bankruptcy. The Ninth Circuit's holding to the contrary is wrong as a matter of public policy and wrong as a mater of law.

CONCLUSION

Amicus Curiae The Latino Coalition respectfully requests the Court to grant the Petition for Writ of Certiorari.

March 18, 2004.

Respectfully submitted,

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